SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 41

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

BRIEF OF PETITIONERS

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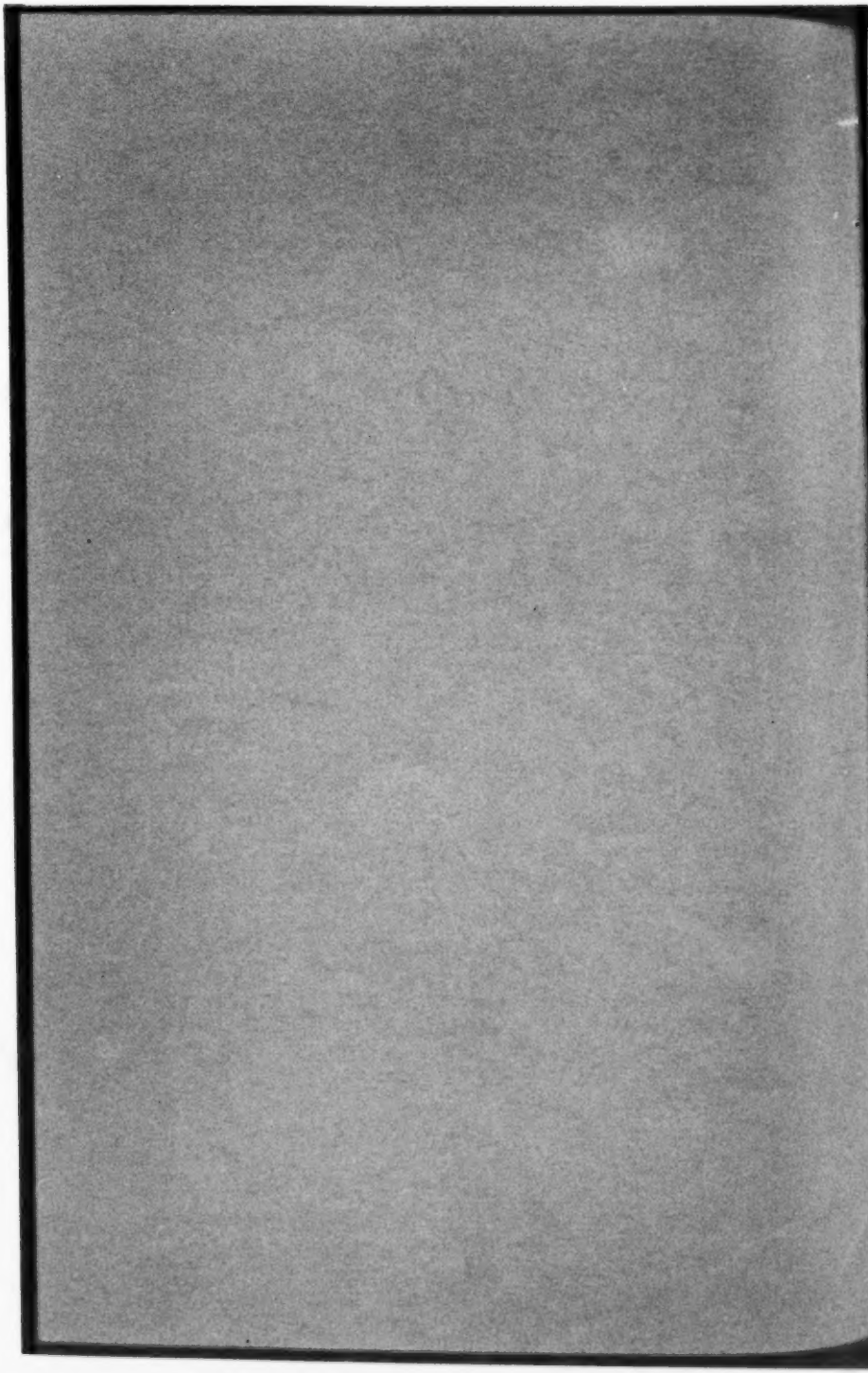

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vs.

E. E. BRUNER,

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BRIEF OF PETITIONERS

Opinion of Courts Below

The verdict of the jury and the judgment of the trial court pursuant thereto were rendered on June 6, 1942 (R. 9-10). The only opinion by a court below is that of the Supreme Court of Utah which is set forth at R. 103-117, is not yet reported in the Utah reports, but appears at 142 Pac. (2d) 649.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked.

The judgment of the Supreme Court of Utah was rendered on October 25, 1943 (R. 117). Petition for rehearing was denied on December 27, 1943 (R. 117). Petition for writ of certiorari was filed on March 18, 1944, and was granted on May 1, 1944, 64 S. Ct. 1047. The judgment of the Supreme Court of Utah is based upon its application of the United States statute commonly called the Federal Employers Liability Act, 45 U. S. C. Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. Sec. 350. Petitioner claimed in the Supreme Court of Utah and here that the Utah court, in holding as matters of law that Respondent was not guilty of contributory negligence and that Petitioner was guilty of negligence, impaired the substantial rights of Petitioner. This raises a federal question.

Brady v. *So. Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232.
Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246.

Statement of the Case

E. E. Bruner (herein called "Bruner"), an experienced engine hostler and hostler's helper (R. 16, 20), recovered judgment for $30,000.00 against the Railroad under the Federal Employers Liability Act on account of the loss of his right leg below the knee resulting from an accident in the course of his employment as hostler helper with Wilson McCarthy and

Henry Swan, Trustees of The Denver and Rio Grande Western Railroad Company (herein called the "Railroad") in Grand Junction, Colorado, just before daylight on December 1, 1941 (R. 1-8). Bruner and his boss (R. 27, 91), Hostler Colosimo, were coaling two engines at the coal chute (R. 33). The engines were headed east, No. 1182 in the lead and No. 1149 in the rear (R. 28, 31). They were coupled together (R. 27). The coupling and relative positions of the two engines are shown in Exhibit 3 (R. 62A, admitted in evidence R. 62), and on Appendix A herein, which is an illustrative sketch not in evidence. The coal chute and track are shown on Exhibit B (R. 36A, admitted in evidence R. 35), and Exhibit E (R. 40A, admitted in evidence R. 40).

Prior to the engines being moved to the coal chute Colosimo and Bruner had handled the two engines and while other employees were cleaning the fires at the cinder pit, which is between the roundhouse and the coal chute, they discussed the movements to be made and the work to be done by each of them upon the engines (R. 31). Bruner was told and knew that the engines were to be removed to the sand house and then to the coal chute, which is north of the track leading from the roundhouse on which the accident occurred, and that Colosimo would coal 1149 and Bruner would coal 1182 (R. 31). Colosimo moved the two engines, using the power of 1149, to the coal chute and spotted 1149 under the chute for coal loading (R. 82). While Colosimo was placing the coal in 1149 Bruner checked the fire in 1182 (R. 53). Having checked the fire in engine 1182 when the two engines were stopped, Bruner's next duty was to get to the top of the tender of 1182 in order to spot it at the coal chute and put coal into it (R. 31, 41).

Colosimo, who was boss (R. 27, 91), told Bruner, who

understood that he must do as Colosimo told him (R. 27), to stay on 1182 and coal it after Colosimo had coaled 1149 (R. 81). Bruner testified that it was his duty to be in position to give signals to Colosimo to start the engine. (R. 28) Colosimo would have to be in the engineer's part of the cab in order to move the engine. (R. 65, 73) This was the right hand or south side of the engines. (R. 65) Accordingly Bruner should have remained on that side. Bruner nevertheless, without telling Colosimo, dismounted from 1182 on the left, the north side (R. 65, and see Appendix A), walked back of its tender and attempted to cross over the draw bars between the two engines for the purpose, as he himself testified, of getting on top of the tender of 1182 (R. 41). As Bruner was crossing over the draw bars Colosimo, assuming that Bruner was on 1182 (R. 101), started the engines and Bruner was thrown to the tracks where the wheels of 1182 passed over his leg (R. 41). There is no evidence, suggestion or contention in the record that Colosimo knew that Bruner was between the engines or intended to go between them.

As is more particularly shown in the argument, Bruner, who was in the cab of 1182, had several safe ways to get to the top of the tender of 1182 to spot and coal it without clambering over the draw bars or even dismounting from the engine. Bruner did not avail himself of any safe course, but chose to clamber over the draw bars. In that precarious position the first movement of the engines dislodged him (R. 41).

On appeal to the Supreme Court of Utah the Railroad relied upon the asserted errors (Statement of Errors Relied On[1]

[1] In the present appellate practice before the Supreme Court of Utah there are no assignments of error. Formerly there were. See Rules of Supreme Court of Utah, Rule VI, 85 Utah page X. The current Rules of the Supreme Court of Utah, effective March 1, 1941, eliminated that rule and in Rule VIII relating to briefs provides merely for a Statement of Errors Relied On. See 100 Utah page XLV.

Nos. 1, 2 and 3, R. 133) that the court in Instruction No. 6 (R. 10, 11) in effect told the jury that Bruner was not and could not be guilty of contributory negligence; and also relied upon the asserted errors (Statement of Errors Relied On Nos. 4, 5, 6 and 7, R. 133, 134) that the court in Instructions 9 (R. 11, 12) and 20 (R. 12) improperly instructed the jury in failing to tell them to make proportionate deductions in damages if they found that Bruner was guilty of contributory negligence. The Supreme Court of Utah *(Mr. Justice Larson dissenting,* R. 116) disposed of the errors so relied on by reaching the conclusion as matter of law that Bruner was not guilty of contributory negligence (R. 107).[2]

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[2] This court has repeatedly declared that it will generally regard the federal question as properly raised if the Supreme Court of the State regarded the question as properly raised according to its practice, as fairly before it for determination and decided it.

Murdock v. *Memphis*, 20 Wall, 590, 633, 634, 22 L. Ed. 429.
Kreiger v. *Shelby R. R. Co.*, 125 U. S. 39, 31 L. Ed. 675, 8 S. Ct. 752.
Fox Film Co. v. *Mullen*, 296 U. S. 207, 80 L. Ed. 158, 56 S. Ct. 183.
Indiana v. *Brand*, 303 U. S. 95, 82 L. Ed. 685, 58 S. Ct. 443.
Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 857.

It is also the law that State Courts in Federal Employers Liability Act cases follow their own rules of practice and procedure and that this court does not interest itself therein unless matters nominally of procedure are actually matters of substance which affect the federal right.

Lee v. *Central of Georgia Railway Co.*, 252 U. S. 109, 64 L. Ed. 482, 40 S. Ct. 254.
Minneapolis & St. Louis R. Co. v. *Bombolis*, 241 U. S. 211, 60 L. Ed. 961, 36 S. Ct. 595.

This court has specifically held that it is not concerned with matters of state practice with respect to instructions to the jury in Federal Employers Liability Act cases unless they involve the construction or application of the Act itself.

L. & N. R. Co. v. *Holloway*, 246 U. S. 525, 62 L. Ed. 867, 38 S. Ct. 379. On page 528 the court said:

* * * Nor need we determine whether the local rule of practice, that if instructions are offered upon any issue respecting which the jury should be instructed and they are incorrect in form or substance it is the duty of the trial court to prepare or direct

The Railroad also relied upon the asserted error (Statement of Errors Relied On No. 2, R. 133) that Instruction No. 6 (R. 10-11) improperly instructed the jury that Bruner was within the protection of two safety rules and that the court improperly instructed the jury in regard to safety rules inapplicable to the case. Those rules were as follows:

Rule 2057 provided:

> Engine bell or whistle warning must be given before engines are moved, then wait at least one minute. (R. 5)

Rule 30 provided:

> The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade. (R. 4.)

The Utah Court stated (R. 108) that this Court considered the latter of these two rules in *Owens* v. *U. P. R. Co.*, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, but did not decide whether or not it was applicable to yard movements. The Utah Court stated that there was considerable doubt that these rules had

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the preparation of a proper instruction upon the point in place of the defective one (see Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, 316) was applicable in the case at bar. That is a question of state law, with which we have no concern.

Central Vermont Ry. Co. v. *White*, 238 U. S. 507, 59 L. Ed. 1433, 35 S. Ct. 865.

It is the general rule that State courts are bound to proceed in such manner that all substantive rights of the parties under controlling Federal law are protected but that this court does not sit to review the propriety of the practice and procedure of the State courts.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246.

Lisenba v. *People of State of California*, 314 U. S. 219, 86 L. Ed. 166, 62 S. Ct. 280.

For these reasons it is assumed that this court will not be interested in the details of how this federal question was raised and preserved in the State court. If the court is interested the details are set forth in Appendix B.

any application to the case at bar, but disposed of the errors so relied on by holding *(Mr. Justice Moffat dissenting,* R. 117) that it was not prejudicial error in any event because the Railroad was guilty of negligence as matter of law (R. 108, 110).[3]

Thus the Supreme Court of Utah held as matter of law that on the evidence introduced, the trial court would have been justified in peremptorily instructing the jury, thus eliminating those issues from the trial by jury, that the Railroad was guilty of negligence and that Bruner was not guilty of contributory negligence. It held that the Railroad was not entitled to a *fair* jury trial of those issues because it was not entitled to *any* jury trial of those issues.

Specification of Errors.

The Supreme Court of Utah erred in holding as matter of law that Respondent was not guilty of contributory negligence.

The Supreme Court of Utah erred in holding as matter of law that Petitioners were guilty of negligence.

SUMMARY OF ARGUMENT

I. THE MAJORITY OPINION OF THE SUPREME COURT OF UTAH ERRED IN HOLDING AS MATTER OF LAW THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

In so holding the Supreme Court of Utah disregarded evidence which would support a finding that Bruner was

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[3] For the reasons stated in footnote (2) it is not expected that this Court will be interested in the details of how the points decided by the Supreme Court of Utah were raised and preserved. If the details are of interest they are set forth in Appendix C.

negligent in four particulars. There is substantial evidence that Bruner chose an unnecessarily hazardous way of proceeding from the cab to the tender of 1182; violated his duty to stay in sight of Colosimo so as to give signals; disobeyed instructions from Colosimo to stay on 1182; and failed to inform Colosimo that he was going to climb over the draw bars between 1149 and 1182.

Bruner knew that Colosimo was coaling the westerly engine 1149 and would in the very near future move both engines westerly so as to spot 1182 for coal loading by Bruner. Colosimo would use the power of 1149 for that purpose. He would operate in the Engineer's side of the cab of 1149 and therefore would be on the south side of 1149. It was Bruner's duty to be in a position where he could give Colosimo a signal to move the engines. This required Bruner to be on or along the south side of Engine 1182.

Bruner could have fulfilled that duty and also reached the top of the tender of 1182, by getting down from engine 1182 on the south side, walking back along the south side of the engine to the tender and then climbing up the ladder to the top. Thus he would have been within the sight of the cab of 1149 at all times and would not have had to climb over any couplers or draw bars because the ladder up the rear end of the tender of 1182 was also on the south side of the couplers and draw bars.

Bruner could also have proceeded from the cab of 1182 to the top of its tender in two other ways without dismounting from the engine at all and without getting out of Colosimo's sight except for a very short time. First, he could have gone up the coal gate at the front of the tender of 1182. Secondly, he could have gone out the front door of the cab and up over the top of the cab on to the tender.

Instead of performing his duty in one of these three ways and moving safely to the place of his next duty, Bruner dismounted from the engine on the north side, the side away from the engineer's side, in a position where he could not be seen and where he could not give a signal to Colosimo. From there he walked to the rear of the tender and then climbed over the draw bars and couplers to reach the ladder on the south side. This was awkward, dangerous and without the benefit of safety appliances for the purpose.

In so doing Bruner disregarded the instructions given him by his boss Colosimo, which Bruner testified he was under the duty of obeying. Colosimo testified that he told Bruner to stay on 1182 and assumed that Bruner was on 1182, Bruner also failed to inform Colosimo that he was getting off 1182 and crawling over the draw bars between the two engines.

II. THE MAJORITY OPINION OF THE SUPREME COURT OF UTAH ERRED IN HOLDING THAT THE RAILROAD WAS GUILTY OF NEGLIGENCE AS MATTER OF LAW.

The Supreme Court of Utah held that there was considerable doubt as to whether the two rules relied on by Bruner were applicable to this case; but that that question was immaterial because the evidence showed that there was a custom and practice to move engines only upon signal from the hostler helper and after the hostler sounded the whistle; and that the evidence of this custom and practice established that the Railroad was guilty of negligence as a matter of law.

As to whether the violation of custom and practice constitutes negligence per se or whether it is merely one fact to be submitted to the jury, depends upon the facts and circumstances

of the case. This has been held both by this court and by the Supreme Court of Utah.

Colosimo, regardless of such practice and custom, had good reason to think that Bruner would be on engine 1182 in a position of safety. He had told him to stay there and it was Bruner's duty to obey that instruction. Moreover, it was Bruner's duty to be in a position such that he could signal to Colosimo when Colosimo was in the engineer's side of the cab of 1149 ready to operate the engine. This would require Bruner to be on or along the south side of the engine. It was also safest for Bruner to move from the cab of 1182 to the top of its tender on or along the south side of the engine.

Colosimo as a reasonable man need not anticipate that Bruner, instead of obeying Colosimo's instructions, instead of performing his duty to be in a position to transmit the signal, would get off the engine on the north side, walk back and then climb over the couplers and draw bars to get to the ladder which was on the south side.

The Railroad does not need to contend that the Utah court should have held as matter of law that Colosimo as a reasonable man need not anticipate that Bruner might place himself in that position of danger. It is only necessary to contend that on that question there was substantial evidence and that it should not have been decided as matter of law.

ARGUMENT

(All italics are added.)

I.

THE MAJORITY OPINION OF THE SUPREME COURT OF UTAH ERRED IN HOLDING AS MATTER OF LAW

THAT RESPONDENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

The majority opinion of the Supreme Court of Utah held that there was no evidence to show contributory negligence on the part of Bruner (R. 106) and therefore that the Railroad was not entitled to a *fair* jury trial of the issue of contributory negligence because it was not entitled to *any* jury trial of that issue. Mr. Justice Larson dissented. At R. 116 he said:

> As I read the evidence and authorities, the question of contributory negligence on the part of plaintiff *was a question for the jury.*

In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 446, 63 S. Ct. 444; *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062; *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715, 87 L. Ed. 1683, 63 S. Ct. 1271, and *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232, this Court held that questions should not be decided as matter of law where the evidence and tendencies of the proof are conflicting and that to withdraw them is violative of the rights of the employees or their dependents.

There is substantial evidence to support a finding that Bruner was guilty of contributory negligence in four particulars:

1. *Bruner chose an unnecessarily hazardous method of proceeding from the cab of engine 1182 to the top of the tender.*

2. *Bruner's choice of ways was in violation of the duty, which he testified he was under, to be in position to give signals to Colosimo.*

3. *There is evidence that Bruner disregarded the instructions of his boss in getting off engine 1182.*

4. *Bruner failed to inform his boss that he was going to clamber over the draw bars and coupler between engines 1182 and 1149.*

---

1. *Bruner chose an unnecessarily hazardous method of proceeding from the cab of engine 1182 to the top of the tender.*

The majority opinion of the Utah Court at R. 105 states:

> * * * In order for the plaintiff to take coal on engine 1182 it was necessary for him to be on top of the tender. There were several methods by which he could have climbed there. *At the point where he was standing at the rear of the north side of the tender there was no ladder leading to the top of the tender.* However, immediately across from this point on the rear of the south side of the tender there was such a ladder. *To reach this ladder there were at least two direct methods he could have used.* One would have been to cross over the pilot (a flat platform on the front of the engine) on Engine 1149. The other way, the way he chose to go, was to climb over the draw bar between the two engines which were coupled together.
>
> * * * It was the plaintiff's duty to get on top of the tender on Engine 1182. *He chose a manner of getting there which is not shown by the evidence to be either unusual or dangerous.* In fact, the only evidence is that which he gave that he had often used this route and that it was a common practice among yardmen to do so. (R. 106.)
>
> * * * *While it may be, as defendants argue in their brief, that the manner chosen was highly dangerous, there is no evidence to show this. We must conclude that the record does not show contributory negligence.* (R. 106-107)

The majority opinion of the Utah Court, when it reached the question of whether Bruner chose an unusual and dangerous way of getting on top of the tender of Engine 1182, placed Bruner at the rear of the north side of the tender. After so placing him, it points out that there was no ladder at that corner leading to the top of the tender and concludes that it was therefore necessary for him to cross from the north side to the south side. But Bruner did not start from the rear of the north side of the tender. He came to that point only enroute from the cab of Engine 1182 to the top of the tender (R. 41). There was no reason for Bruner to be on the north side of the engine or at the rear of the north side of the engine. He was in the cab of the engine when his duty required him to get to the top of the tender (R. 41).

At the time the two engines commenced backing from the sand house to the coal chute Bruner was on the south running board of Engine 1182 (R. 31-32). Bruner then moved back along the south running board through the door into the cab of the engine and when the engine stopped he was in the cab of Engine 1182 (R. 41, 60). Being in the cab of the engine when it stopped, he checked the fire (R. 41). His next duty was to get to the top of the tender of 1182 in order to take coal from the coal chute (R. 41).

There were five different ways for him to reach his objective.

First. Without dismounting from the engine he could have moved straight back from the cab climbing up the coal gate of the tender, which is directly back of the gangway. (R. 99, 100). This was the most direct and easiest way of reaching his objective.

At R. 100, Colosimo testified as follows:

> A. Yes, sir. Some of them—they have so many ways of working—*some of them crawl up over the gates and get into them.*

For the better understanding of the court there is set forth in Appendix A a sketch illustrative generally of Engine 1182 with its tender, coupled to Engine 1149, and marked thereon by different types of lines are the various methods of moving from the cab to the tender. This sketch is not in evidence. It is illustrative of the situation involved which established by the evidence. The solid black line marked No. 1 shows the direct route back from the cab up the coal gate on to the top of the tender.

Second. Without dismounting from the engine he could move from the cab through the door leading to the running board and thence over the top of the cab to the tender. It was customary practice for enginemen to move from the running board over the cab on to the tender. At R. 85 Colosimo testified as follows:

> Q. How did the hostler's helper get onto the tank to take coal on that front locomotive, after moving from the sand house?
>
> A. Most of them are over the cab into the tender.
>
> Q. How do they get over the cab?
>
> A. They climb up on the boiler and just step right up on the cab there.

This second method, although more circuitous than the first, did not involve dismounting from the engine. Colosimo testified that this was the easiest way for Bruner to get on to the tender from the running board (R. 101). In Appendix A it is shown by the dotted line marked No. 2.

Third. Bruner could have dismounted from the engine on the south side, which was the same side on which the ladder going up the rear of the tank is placed, walked back on the ground along the south side of the engine to the ladder, and climbed the ladder on to the tender.[4] This was not as easy as the first or second methods, but it did not involve dismounting from the engine on the wrong side and then crawling over the draw bar. The third way is shown on Appendix A by the line of dashes marked No. 3.

Fourth. The fourth way, and that chosen by Bruner, was to dismount from the engine on the north side, which is the side away from that on which the ladder goes up the back of the tank, walk back along the wrong side of the engine to the north rear corner and then clamber over the draw bar. This course is shown on Appendix A by the line of crosses marked No. 4.[5] It was only after he chose this way and reached the north rear corner of the tank that he came enroute to the place where the majority opinion of the Utah Court places him when it describes his choice of routes preliminary to its conclusion that his choice was neither unusual nor dangerous.

Fifth. Even after reaching the rear of the tender on the north side and deciding to cross through two live engines, Bruner had a perfectly safe way open to him, as is shown by Exhibit 3 (R. 62A, introduced in evidence at R. 62). This was to mount the step on the north side of the pilot of Engine No. 1149,

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[4] As shown on the sketch, Appendix A, this ladder is nearer the center of the rear of 1182 than it is in fact, as shown on Exhibit A (R. 34A, introduced in evidence R. 34), and Exhibit F (R. 74A, introduced in evidence R. 74).

[5] The line of crosses on this rough sketch can be seen through the tender of 1182, indicating Bruner's movement on the north or left hand side of 1182.

step up to the pilot deck, take hold of the circular handhold around the front of the boiler of 1149, cross the deck, step down to the footstep on the south side, step across to the south footstep at the rear of the tender of 1182 and climb up the ladder at the rear of 1182. Exhibit 3 clearly shows all of this. The front of 1149 is designed for such a maneuver, as shown by the circular handhold. The rear of 1182 is not so designed, as is shown by the absence of a horizontal handhold at a convenient height. This way is shown on Appendix A by the line of alternate crosses and dashes marked No. 5.

It is true that Bruner could, within the realm of reason, choose his course, but that choice may not be a capricious, whimsical or outrageous choice. It is elementary in the law of principal and agent that although an agent may have latitude in choice of methods, yet he may not choose an outrageous method. If he does and it is dangerous, he is guilty of negligence. It is well established that it is negligence for an agent to choose a dangerous way of doing a thing when safe ways are open to him.

Atlantic Coast Line R. Co. v. *Davis*, 279 U. S. 34, 73 L. Ed. 601, 49 S. Ct. 210.
Fritz v. *The Salt Lake and Ogden Gas and Electric Light Co.*, 18 Utah 493, 56 Pac. 90.
Beulah Coal Mining Co. v. *Verbrugh*, 292 Fed. 34, (8th C. C. A.).
H. D. Williams Cooperage Co. v. *Headrick*, 159 Fed. 680 (8th C. C. A.).

The evidence shows that Bruner chose an unusual and dangerous way. Exhibit A (R. 34A, introduced in evidence at R. 34) shows the rear end of the tender of Engine No. 1182. The distance between the rails on which it stands is four feet eight and one-half inches, standard gauge. It can be seen

from the picture that the tender overhangs the rail approximately two feet on each side. The ladder on the right hand side overhangs the right hand rail. The only handhold for Bruner to use in mounting from the ground on the left hand side to the cross beam is vertical and extends downward to the left of the left rear corner of the tender of 1182. The distance from that handhold to the ladder is apparently between five and six feet.

In can been seen from Exhibit F (R. 74A, introduced in evidence at R. 74) that there is no horizontal handhold crossing from the ladder, on the right, to the vertical handhold on the left, designed or convenient for the use of men crossing over the draw bar or on the cross beam. The only horizontal handhold on the rear of the tender of 1182 is that which is shown on Exhibits A and F (R. 34A and 74A) crossing immediately above the cross beam. There are two rods shown crossing immediately above the cross beam. The lower one is the rod which controls the pin lift lever. (R. 61) Immediately above that is the handhold provided for trainmen standing on the footsteps at the rear of 1182. (R. 61-62, 75)

It is a permissible inference from Bruner's testimony that he intended to move from the north to the south side by moving along the cross beam immediately under the pin lift lever rod, shown on Exhibit A (R. 34A) and Exhibit F (R. 74A), rather than by crawling over the draw bar from one footstep to the other at the rear end of the tender of 1182 (R. 75). Examination of Exhibits 3, A and F (R. 62A, 34A and 74A) will demonstrate that either way is awkward, clumsy and dangerous. Also they disclose that such movement is not contemplated by the design of the safety appliance steps and handholds.

Inspection of Exhibit 3 (R. 62A) shows that Bruner's

evidence, given in response to leading questions by his own counsel, that it is common practice to move from one side of 1182 to the other along the cross beam, is ridiculous and not entitled to serious consideration. Particularly is this so in view of Bruner's reluctance to answer leading and suggestive questions put to him by his own counsel. At R. 75, 76 he testified as follows:

> Q. You may state whether or not, in the course of your employment as a hostler, or a hostler's helper and fireman, you have occasion to cross from one side to the other of an engine coupled to a tender, and to pass over the drawbar?
>
> A. Yes, many times I have had occasion to. I did so many times. It is a common practice to get off and go up that way.
>
> Q. *There is no effort at all?*
>
> A. *I have had occasion to.*

His counsel attempted to induce Bruner to testify that it was "no effort at all." Bruner would only go so far as to say, "I have had occasion to."

It can be seen from Exhibit 3 that there is very little space, certainly not enough for an adult human foot clothed in a shoe to rest on that beam between the handhold and the rear end of the tank. It can be seen that a person attempting to move across that beam would be entangled in the pin lift lever rod and the handhold. It is evident that it would be a clumsy, awkward and dangerous movement. It cannot be contended that, in moving across on the cross beam, safety can be secured by holding on to the handhold provided for men riding the footsteps of 1182. A man attempting so to do would be leaning over in a position such that his hands would be just above

his feet, almost certain to fall whether the engine moved or not.

If Bruner's evidence means that he crawled over the draw bar from one footstep to the other, Exhibits 3, A and F show that that also was awkward, clumsy and dangerous. The draw bar would be almost waist high. It is also quite wide. Such a crossing is obviously not contemplated by the design of the safety appliance handholds. Handholds are provided wherever railroad men are supposed to hold on to prevent that very result. If Engine 1182 had been designed with the intention that trainmen would cross from the left hand side to the right hand side, along the cross beam, there would have been a horizontal handhold at a suitable height to hold on to while so doing, as well as a suitable footway much broader than the cross beam. Inspection of all of the pictures in evidence shows handholds wherever trainmen are supposed to hold on engines. Thus Exhibit 1 (R. 56A, introduced in evidence at R. 55) shows the handhold along the boiler to support enginemen moving on the running boards. The front of Engine 1182 shown on Exhibit 1 shows a handhold around the circumference of the front of the boiler and also a handhold across the pilot. Exhibit F shows a handhold at the right rear corner of the tank and at the left rear corner of the tank and a horizontal handhold running across the tank immediately above the cross beam. There is, however, no horizontal handhold shown across the top of the tank at a height designed to be used by a man moving across the rear of the tank of 1182.

It is submitted that Exhibts 3, A and F show that it was unusual and dangerous for Bruner to cross either along the cross beam or clamber over the draw bar, and that the evidence

demonstrates that Bruner chose a dangerous way when safe ways were available and thus under the law announced by this Court there was substantial evidence from which the jury would have been justified in finding that Bruner was guilty of contributory negligence.

The Supreme Court of Utah said (R. 106, 107) that there was no evidence to show that this was dangerous. The physical facts are shown by the pictures, Exhibits 3, A and F. What further evidence could there be? The opinion or conclusion of some witness? It would be objectionable as such. If the issue were whether a person was negligent in crossing over a third rail in a subway and pictures of the physical facts were in evidence, would it be necessary to have some witness express the opinion that it is dangerous? It is submitted that the physical facts and circumstances are real evidence and that the situation involved does not justify or require the opinion of an expert to aid the jury in perceiving the danger.

It is submitted that the above is sufficient evidence to sustain a finding of contributory negligence.

2. *Bruner's choice of ways was in violation of the duty, which he testified he was under, to be in position to give signals to Colosimo.*

Bruner testified that it was his duty to be wherever he had to be to give signals so they would be seen by the hostler Colosimo. At R. 28 Bruner testified as follows:

> Q. Where would the helper be?
> A. Wherever his work was to be, he would be wherever he had to be to give the signals so they would be seen.

The next move after 1149 was coaled was for Colosimo

to move the two engines westerly to spot 1182 in position to be coaled. (R. 83) This would be done by Colosimo in the engineer's side of the cab of 1149. (R. 65, 73) This was the right hand or south side of the cab. (R. 65) Colosimo, in the engineer's side of the cab of 1149, could see Bruner if Bruner were on that same side of the engines. Colosimo could not see Bruner if Bruner were on the left hand or north side of the engines. (R. 73, Appendix A.)

As is shown above, Bruner could have dismounted from engine 1182 on the south side and moved back along the south side to the rear of 1182. If he had done so he would have been in sight of Colosimo in the engineer's side of the cab of 1149. By so doing Bruner would have been fulfilling his duty, which he himself said he was under, of being in position to give Colosimo a signal.

Nevertheless Bruner dismounted from the left hand or north side of 1182 where he couldn't be seen by Colosimo and could not give a signal to Colosimo. (R. 73) Thus, according to his own testimony, he violated his duty.

The Railroad's contention does not go to the extent of claiming that Bruner could never get out of sight of the engineer's cab of 1149. No doubt he could do so in the performance of other duties. But at the moment in question Bruner had completed his work on 1182 except to coal it. The next thing to be done was to move the engines so as to spot 1182 for coaling. According to Bruner that move would be made only on signal from Bruner to Colosimo. (R. 24, 27) Why then, if Bruner decided to get down from the engine at all, didn't he get down on the south side, the engineer's side of 1149 where Colosimo in the cab could see him? It was easier than the north side because it didn't involve crossing over the draw bars. It was safer, as shown above under I-1.

It is submitted that this was evidence sufficient to justify a finding of contributory negligence.

3. *There is evidence that Bruner disregarded the instructions of his boss in getting off engine 1182.*

The evidence is uncontradicted that Colosimo was the boss and that it was Bruner's duty to obey his instructions. There is also evidence from which the jury could find that Colosimo instructed Bruner to stay on Engine 1182 and that it was negligent of Bruner to disregard that order.

Colosimo was in charge of the activities of Bruner. He was the boss (R. 27). Bruner recognized that. At R. 27 he said:

> Q. Who is the boss?
> A. The hostler, always, with the hostler helper. The hostler helper has to do whatever the hostler tells him to do.
>
> Q. You may state whether or not you worked under the direction of Mr. Colosimo during this shift?
> A. Yes, whatever he told me to do, that is what I did, and my business to do.

At R. 50 he said:

> Q. That was a part of your duties?
> A. My duty was to do whatever he told me to.

At R. 81 Colosimo testified as follows:

> I told him for him to sand 1182 *and stay on her and coal her*, and at the same time I would take care of the 1149.

Colosimo testified at R. 102 as follows:

> A. I just told him to stay on the 1182. That is

what I told him, just to stay on the 1182, and I would take care of the 1149.

On recross-examinaton Colosimo testified as follows:

By Mr. Black:

Q. All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?
A. Yes, sir (R. 102).

Counsel for Bruner have argued that merely because Colosimo on recross-examination testified that all he meant was that Bruner would take care of 1182 negatives the plain meaning of what he told Bruner. Colosimo told Bruner to stay on 1182 and coal it. Bruner's counsel asked Colosimo what he meant. Of course, what he meant by the words he spoke is immaterial. The material thing is what the words would mean to an ordinary railroad man. The Utah Court used Colosimo's statement as to what he meant to render completely impotent the ordinary meaning of what he said and concluded that therefore as a matter of law Colosimo did not direct Bruner to stay on the engine (R. 106). Bruner himself did not take this view of the evidence that Colosimo directed him to stay on the engine, because he denied that Colosimo so instructed him (R. 70-71). Thus there was a conflict in the evidence as to whether Colosimo instructed Bruner to stay on the engine. Colosimo said "Yes." Bruner said "No." The holding of the majority opinion of the Utah Court is that even though the jury might find that Colosimo did say, "*stay on the engine and coal it*," this should be taken by Bruner to mean only "*coal it*" because on cross-examination Colosimo said that was all he meant and, therefore, the jury should not be permitted to find that it meant anything else.

This attributes to Colosimo's statement the effect of an admission by defendants. It is as if the court reasoned, "Colosimo states that what he said meant only, 'coal it,' therefore defendants are bound by it." This is unwarranted. No foundation was laid constituting Colosimo's statement an admission.

Meyers v. *S. P. L. A. & S. L. R. Co.*, 36 Utah 307, 104 Pac. 736; 39 Utah 198, 116 Pac. 1119.

It is submitted that the jury could have found that Colosimo instructed Bruner to stay on Engine 1182, that it was Bruner's duty to obey Colosimo and that Bruner disobeyed. Was this contributory negligence? Consider the conditions under which the order was given. The hostler Colosimo and his helper Bruner were preparing these engines for service. They had been brought from the round house. (R. 31, 79) They were moved to the cinder pit to have the fires cleaned. (R. 31, 80) They were moved to the sand house and supplied with sand. (R. 31, 80) Then they were moved to the coal chute to be loaded with coal. (R. 31) Then they would be moved to the water spout to be supplied with water and finally they would be taken to the point where they would be used. (R. 51, 80.) It was a process of movement from one point to another. Bruner was an experienced hostler helper. (R. 17) He knew what was to be done. (R. 31) He knew that coal was to be put in both engines. (R. 33) The two engines could not be coaled at the same time. (R. 55) Bruner knew that after Colosimo coaled 1149 he would have to move the engines so that Bruner could coal 1182. (R. 55) It was really the duty of the hostler helper to put coal in the engines. (R. 45, 50) But Colosimo told Bruner that he would coal 1149 and for Bruner "just to stay on 1182." Why did Colo-

simo so do? Is it not a fair inference that it was to expedite the work? Colosimo was on 1149 and would coal it instead of Bruner; then Colosimo would move the two engines and Bruner would coal 1182; and then they would move the engines away from the coal chute. Thus Bruner knew that as soon as Colosimo finished coaling 1149 it would be in order for Colosimo to move both engines so that Bruner could coal 1149. Colosimo had told Bruner to sand 1182 and "stay on her and coal her." Under those circumstances, Bruner as a reasonable man should have realized that Colosimo might expect Bruner to stay on 1182 and that he could safely move the engines.

It is submitted that the evidence was sufficient to sustain a finding of contributory negligence.

4. *Bruner failed to inform his boss that he was going to clamber over the draw bars and coupler between engines 1182 and 1149.*

If, however, Bruner had some reason to disregard the instruction of Colosimo to stay on 1182 and to clamber over the couplers and draw bars of two live engines, which he knew were to be moved in the near future, he should have notified Colosimo of his intention. It is submitted that the finder of facts would be justified in concluding that it was a lack of ordinary care for him to fail so to do.

II.

THE SUPREME COURT OF UTAH ERRED IN HOLDING THAT PETITIONERS WERE GUILTY OF NEGLIGENCE AS MATTER OF LAW.

The Railroad relied upon the error (R. 133) that the trial court in Instruction No. 6 told the jury that Bruner had

the right to presume and *act upon the presumption* that Colosimo would obey and not violate Rule 2057 reading as follows:

> Engine bell or whistle warning must be given before engines are moved, then wait at least one minute.

and Rule 30 reading as follows:

> The bell must be rung when an engine is about to move and while approaching and passing stations, tunnels, snow sheds and public crossing at grade.

The Railroad contended that the instruction was erroneous because the rules were inapplicable to the case at bar. (See Appendix C) The Supreme Court of Utah avoided that question by reasoning that, entirely aside from the rules, there was a practice or custom established by Bruner's evidence that engines would be moved only on signal and then only after giving a signal (R. 108-110), and that the trial court would have been justified in directing a verdict for plaintiff, thus holding as matter of law that the Railroad was guilty of negligence. (R. 110)

Mr. Justice Moffat dissented, stating that he thought the evidence does not establish negligence as a matter of law. (R. 117)

It can not be argued that such a practice or custom is wholly inflexible and could not be departed from even by agreement between the workers involved. Suppose for example that Bruner and Colosimo expressly agreed that Bruner was to stay in the cab of the engine and that Colosimo would move the engines without signal or whistle as soon as he finished coaling 1149. It would hardly be contended that under such circumstances moving the engine without signal or whistle would constitute negligence as to Bruner.

Customs and practices do not rise to higher authority than express rules and regulations. They are at most informal rules. The master has not decreed and promulgated them. The workmen have themselves merely established a practical method.[6]

Far from being binding or inflexible, custom and practice are admissible, if at all, only as some evidence of what ought to have been done in the exercise of reasonable care.

Texas and Pacific R. Co. v. *Behymer*, 189 U. S. 468, 47 L. Ed. 905, 23 S. Ct. 622. On page 470 the court said:

> * * * What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

The Supreme Court of Utah has said that violation of a safety rule does not necessarily constitute negligence as a matter of law and that whether it does so or not depends upon the facts and circumstances of each case.

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[6] In *Owens* v. *Union Pacific R. Co.*, supra, this court declined to consider the propriety of the court's instruction regarding the applicability and effect of Rule 30 because the Court of Appeals did not reach that question. So in the case at bar the Supreme Court of Utah did not reach similar questions with respect to Rules 30 and 2057. It is therefor assumed that this court will find no occasion to decide the question.

If this court does consider the question and decides that they are applicable, the Railroad relies on the same argument herein made as to custom and practice. Indeed the cases cited for the proposition that disregard of a custom or practitce is merely one circumstance to be submitted to the jury are cases involving disregard of rules. They are relied on by analogy for the proposition that disregard of a practice or custom is merely one circumstance to be considered by the jury.

If the court is interested in the Railroad's argument that Instruction No. 6 erroneously assumes as matter of law that Bruner at the time of the accident was within the protection of Rules 30 and 2057 it is set forth in Appendix D.

Allison v. *McCarthy et al.*, 147 Pac. (2d) 870, Utah (not yet officially reported). On page 872 the court said:

> The following cases are in harmony with the view point that whether or not a violation of a safety rule constitutes negligence as a matter of law or is a question for the jury depends upon the facts and circumstances of each case.

One case cited by the Utah court for the foregoing proposition is *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 77 L. Ed. 743, 53 S. Ct. 343, in which this court held that violation of a safety rule by Rocco was one circumstance for consideration of the jury and did not hold that it established negligence as matter of law.

Such also was the effect given by this court to a violation of a rule requiring the sounding of a whistle before moving an engine (the very same rule involved in the case at bar) in *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409, in which the court said, page 411:

> As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question. In view of respondent's own rule that a bell must be rung "when an engine is about to move," it was not unreasonable for the jury to conclude that the failure to ring the bell under these circumstances constituted negligence. This was not an operation where bell ringing might be termed unnecessary or indiscriminate as a matter of law.

There were facts and circumstances in the case at bar which made it a jury question as to whether Colosimo, in the exercise of reasonable care, should have followed the customs and practices of awaiting Bruner's signal to move and giving a warning whistle signal.

As is shown under I, 2, Bruner testified that it was his duty to be in a position to give hostler Colosimo signals to move the engines. And it is demonstrated that Bruner could not perform that duty on the north side of the engine. There is also the evidence of Colosimo that he could have seen Bruner if Bruner was on top of the tender of 1182 if Bruner was showing a light. Under the evidence, to perform that duty Bruner would have to be either on the ground on the south side of the engines or on the south side of the engines.

Would not the jury be justified under the evidence in finding that Bruner should have been in such position? Would it not be justified in finding that Colosimo, in the exercise of reasonable care, need not anticipate the possibility of Bruner getting down on the north or left hand side of the engines, out of sight and unable to give a signal to Colosimo?

Moreover, there is evidence that would justify the jury in finding that Colosimo told Bruner to stay on 1182. (R. 81) It is uncontradicted in the evidence that if Colosimo did tell Bruner to stay on the engines, it was Bruner's duty to obey. (R. 27) Thus the jury under the evidence could have found that Colosimo, the boss, told Bruner to stay on 1182; that it was Bruner's duty to obey; that Colosimo had the right to assume, as he testified he did (R. 101) that Bruner would stay on 1182, would not get down on to the ground, and was therefore on engine 1182 in a position of safety; that Colosimo as a reasonable man was not under the necessity of anticipating that Bruner in violation of his duty and Colosimo's instruction had climbed down on the north, the wrong side, and walked back and was clambering over the draw bars between 1149 and 1182; and that Colosimo as a reasonable man was justified in thinking, as he says he did (R. 101), that Bruner was on the tender of 1182.

It is well settled law that in determining whether a defendant is guilty of negligence, it is necessary that he anticipate only such possibilities as may be reasonably expected.

A. T. & S. F. Ry. Co. v. *Calhoun*, 213 U. S. 1, 53 L. Ed. 671, 29 S. Ct. 321. On page 9 the court said:

> * * * It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that "if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." Pollock on Torts, 8th ed. 41.

And on page 10:

> * * * There was a wooden platform by the track at the station 100 feet more or less in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity, much less that a person would take a helpless infant and while thus running attempt to place it on the train. *We are of the opinion that the railroad was*

not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be reversed.

So in the case at bar it is submitted that the jury could under the evidence have found that Colosimo in the exercise of reasonable care was not bound to foresee and guard against the extraordinary conduct of Bruner in violating both his duty and the instruction given him by Colosimo, was not bound to anticipate that Bruner would unnecessarily place himself in the hazardous position of clambering over the draw bars.

The principle above relied on from the Calhoun case is entirely distinct from the law of proximate cause and has been repeatedly so applied.[7]

Kansas City So. Ry. Co. v. *Pinson*, 23 Fed. (2d) 247, (5th C. C. A.)

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[7] The Calhoun case is especially interesting because in it are separately discussed two distinct principles of the law of negligence which are sometimes confused.

First, There is a principle of the law relating to proximate cause (discussed on pages 7 and 8) that an actor who puts in motion a train of circumstances is not liable for consequences of his act which are not natural and probable consequences and which ought not to have been foreseen by a reasonably prudent man. This court applied that principle to the negligence alleged against the railroad that it was negligent in not giving the mother of the injured child a reasonable opportunity to detrain. This court held that it was not a natural and probable consequence of such failure that a man to whom she handed the child from the moving train would hand it to another, who would chase the train and try to put the child back on. The Railroad in the case at bar bases no contention on this principle.

Second, There is a principle of the law of negligence (discussed on pages 9 and 10), that the duty to exercise care does not extend to anticipating occurrences which are not reasonably to be anticipated. This court applied that principle to the allegation that the railroad was negligent in leaving a baggage truck on the platform on which the man chasing the train stumbled thus causing the injury to the child. This court held that the railroad was not negligent in leaving the truck in that position because it was not reasonably to be anticipated that injury would result therefrom. That is the principle on which the Railroad in the case at bar bases its present contention.

Fort Smith Gas Co. v. *Cloud*, 75 Fed. (2d) 413, (8th C. C. A.)
Virginia Ry. Co. v. *Station*, 84 Fed. (2d) 133 (4th C. C. A.)
C. St. P. M. & O. Ry. Co. v. *Elliott*, 55 Fed. 949 (8th C. C. A.)

The Railroad is not contending, as was held in some of the above cited cases, that it should be held as matter of law that Colosimo as a reasonable man need not have anticipated that Bruner might be in a position of danger, and that the jury would not be permitted so to find. Its contention is that there were facts and circumstances such that it should not have been decided by the Supreme Court of Utah as matter of law that Colosimo was negligent and that the trial court would have been justified in directing a verdict for the plaintiff on that issue.

The evidence of the custom and practice as to giving signals, the duty of Bruner to be in a position to give signals, the facts with respect to the methods of getting from the cab of 1182 on to the tender should be questions of fact for the determination of the jury—not decided as matter of law.

Tiller v. *Atlantic Coast Line R. Co.*, supra
Bailey v. *Central Vermont Ry. Inc.*, supra.
Owens v. *Union Pacific R. Co.*, supra
Brady v. *Southern Ry. Co.*, supra

It is submitted that the decision of the Supreme Court of Utah violates the principles announced in those cases.

Conclusion

It is respectfully submitted that the judgment of the Supreme Court of Utah should be reversed.

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